

The enterprise zone building materials exemption allows retailers located in the municipality or unincorporated area of a county that established an enterprise zone to make tax-free sales of building materials that will be incorporated into real estate located in the enterprise zone. See 86 Ill. Adm. Code 130.1951. (This is a PLR).

July 26, 1999

Dear Mr. Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see enclosed), is in response to your letter of June 17, 1999. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

I write to request a private letter ruling for COMPANY (referred to as "taxpayer") under 2 Ill. Admin. Code §1200.110. There is no audit or litigation pending relating to the subject matter of this request. To the best of my knowledge and the taxpayer's knowledge, the Department has not previously ruled on the same or similar issue for the taxpayer or a predecessor. Neither the taxpayer nor any of its representatives have previously submitted to the Department a request for a ruling on the same or a similar issue and withdrawn it before the issuance of a letter ruling.

Taxpayer is forming a joint venture ("JV") with BUSINESS to build a co-generation power plant in an enterprise zone in CITY, Illinois. The JV will be formed as a Delaware limited liability company. It will have a contract with the owner of the co-generation plant to build the completed project on a "turnkey" basis. The JV will purchase design services, engineering services, construction management services and construction labor and material. The construction labor and possibly (as discussed below) building material will be supplied by the "Construction Subcontractor" which will have a construction subcontract with the JV.

There are two structures being contemplated. The first would have the Construction Subcontractor contract with the JV to supply the material and labor necessary to build the project. The Construction Subcontractor would purchase the building material from an enterprise zone retailer and install it in the project. The second possible structure would have the JV contract with the Construction Subcontractor for the provision of construction labor only. The JV would purchase the

building material from the enterprise zone retailer as the end user. The JV would then provide the building material to the Construction Subcontractor for installation in the project.

The business reason that dictates consideration of these two alternative structures is the complexity of the material procurement process. From the JV's perspective, the first alternative is preferable because the JV's involvement in the process would be minimized. However, the JV has available engineering expertise that may have to be made readily available to assist the Retailer in the procurement process. If the project's development indicates that this expertise will be needed, then the second alternative will be used. This letter sets out the specifics of each contemplated alternative. I would appreciate your guidance on both of them.

Under the first alternative, the parties would establish a "Retailer," which would be a limited liability company. At this point, it has not been decided if the members of the LLC would be the two members of the JV or whether the LLC will be formed by the Construction Subcontractor. For the reasons set forth below, I believe the ownership of the LLC is immaterial.

The Retailer will supply the building material for the project so as to utilize the exemption afforded to retailers located in the municipality or county which has established an enterprise zone in which a construction project is located. The Retailer will be located in the municipality which has established the enterprise zone in which the co-generation power plant is to be constructed. The Retailer will be located in a trailer on the construction site. The Retailer will register with the Department of Revenue.

Purchases of building material will occur in the following manner. The Construction Subcontractor will prepare and submit purchase orders for the building material to the Retailer. The Construction Subcontractor will also provide the Retailer with an enterprise zone building materials certification containing the information required by 86 Ill. Admin. Code §130.1951(a)(6).

The Retailer will proceed to prepare a purchase order directed to the necessary material supplier. The typical material supplier will not be located in the municipality which has established the enterprise zone in question. It is anticipated that the purchase order from the Retailer to the material supplier will refer to and include a copy of the purchase order from the Construction Subcontractor to the Retailer for purposes of utilizing the product codes involved in the construction project's plans and specification. The Retailer will provide the material supplier with a completed resale certificate.

After the material supplier accepts the Retailer's purchase order, the Retailer will sign and return to the Construction Subcontractor the Retailer's acceptance of the Construction Subcontractor's original purchase order. The Construction Subcontractor will also receive a copy of the purchase order from the Retailer to the material supplier showing acceptance of that purchase order by the material supplier.

No building material will be put into inventory with the Retailer. All the building material will be shipped directly to the construction site. The material supplier will invoice the Retailer. The Retailer will, in turn, invoice the Construction Subcontractor. The Construction Subcontractor will issue a check to the Retailer. The Retailer will issue its check to the material supplier.

These transactions should qualify for the enterprise zone building materials exemption. The Retailer will be physically located in the municipality which established the enterprise zone and will be able to document the acceptance of purchase orders there. The separate sales from the material supplier to the Retailer and from the Retailer to the purchaser required by 86 Ill. Admin. Code §130.1951(a)(3) will exist. The Construction Subcontractor will be the end user of the building material purchased from the Retailer. For purposes of the Illinois occupation and use taxes, the term "construction contractor" includes a subcontractor. 86 Ill. Admin. Code §130.1940(a)(2). The term "owner" means any person who enters into a contract relative to the construction of a structure. 86 Ill. Admin. Code §130.1940(a)(2). By virtue of the construction contract between the JV and the Construction Subcontractor, the Construction Subcontractor will thus be a "contractor" and the JV will be an "owner." A contractor is an end user of building material which he will convert into real estate. 86 Ill. Admin. Code § 130.2075(a)(2). Thus, when the Construction Subcontractor purchases building material which it will install into the cogeneration plant, it will be the "purchaser" as that term is used in 86 Ill. Admin. Code §130.1951(a)(3)(B).

The ownership of the Retailer is immaterial. So long as the Retailer is operated as a separate entity with a physical presence in the municipality which has established the enterprise zone and accepts purchase orders there, the identity of its members or shareholders does not make a difference.

Taxpayer requests a ruling confirming the following:

1. The purchases of the building material by the Retailer from the material supplier will qualify as purchases for resale and will not subject the Retailer to Use Tax;
2. Sales of the building material by the Retailer to the Construction Subcontractor will qualify for the enterprise zone building materials exemption provided for in 35 ILCS 120/5k;
3. The Construction Subcontractor will not incur Use Tax on the building material purchased from the Retailer using the procedure described;
4. Neither the JV nor the owner of the project will incur Illinois Occupation or Use Taxes on the building materials purchased as described and incorporated into the construction project;
5. The answers to the preceding four questions are not affected by whether the Retailer is owned by the JV or by the Construction Subcontractor.

Under the second alternative being considered, the JV would contract with the Construction Subcontractor and with other subcontractors for the supply of construction labor only. The JV would establish the Retailer and purchase all the building materials from the Retailer. The Construction Subcontractor and other subcontractors would install the building materials so purchased by the JV.

Under this second alternative, purchases of building materials would occur as follows. The JV would issue purchase orders to the Retailer together with the enterprise zone building materials certification containing the information required by 86 Ill. Admin. Code § 130.1951(a)(6). The Retailer would issue its own purchase order to the material supplier together with a valid resale certificate.

It is anticipated that the Purchase Order from the Retailer to the material supplier will refer to and include a copy of the purchase order from the JV to the Retailer. It is also anticipated that in some instances the material supplier will be the Construction Subcontractor or one of the other subcontractors. Those instances would occur when the Construction Subcontractor or other subcontractor would be better situated to deal with a material supplier than the JV. In such an instance the Construction Subcontractor or other subcontractor would purchase the building material from the material supplier by using a resale certificate. The Construction Subcontractor or other subcontractor would then resell that building material to the Retailer.

After the material supplier accepts the Retailer's purchase order, the Retailer would sign and return to the JV the Retailer's acceptance of the JV's purchase order.

All the building material would be shipped directly to the JV at the construction site. The installation would be performed by the appropriate subcontractor pursuant to an installation contract with the JV.

The material suppliers will invoice the Retailer. The Retailer will issue an invoice to the JV. The JV will issue a check to the Retailer. The Retailer will issue a check to the material supplier.

Materials purchased for incorporation into the construction project under this alternative should also qualify for the building materials enterprise zone exemption. The Retailer will be physically located in the municipality which established the enterprise zone and will be able to document the acceptance of purchase orders there.

The separate sales from the material supplier to the Retailer and from the Retailer to the purchaser required by 86 Ill. Admin. Code §130.1951(a)(3) will exist. Under the second alternative, the JV will be the end user of the building material purchased from the Retailer. For purposes of the Illinois sales and use taxes, the term "construction contractor" includes both a general contractor and a subcontractor. The contract between the JV and the owner will require the JV to build the project on the owner's land. The JV will thus be the general contractor. The construction

subcontracts with the subcontractors will require the subcontractors to supply the labor and require the JV to provide the building material. The general contractor is the end user of building material which will be converted into real estate. 86 Ill. Admin. Code §130.2075(a)(2). Thus, when the JV purchases building material from the Retailer which will be installed into the project under the subcontracts, the JV will be a "purchaser" as that term is used in 86 Ill. Admin. Code §130.1951(a)(3)(B).

I request that you confirm the following conclusions regarding the second alternative.

1. The purchases of the building material by the Retailer from the material suppliers will qualify as purchases for resale and will not subject the Retailer or the material suppliers to occupation or use taxes;

2. Sales of the building material by the Retailer to the JV will qualify for the enterprise zone building materials' exemption provided for in 35 ILCS 120/5k;

3. The JV will not incur Use Tax on the building material purchased from the Retailer using the procedure described;

4. Neither the JV nor the owner of the project will incur Illinois Occupation or Use Taxes building materials purchased as described in the second alternative and incorporated into the construction project;

Thank you for your consideration of this request.

Enclosed is a copy of 86 Ill. Adm. Code 130.1951 concerning Enterprise Zones. The enterprise zone building materials exemption allows retailers located in the municipality or unincorporated area of a county that established an enterprise zone to make tax-free sales of building materials that will be incorporated into real estate located in the enterprise zone.

In order for businesses to qualify for the exemption as retailers, they must comply with the following requirements:

1. Retailers must have an identifiable physical presence in the municipality or the county that has established the enterprise zone;
2. Retailers must register with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone;
3. Retailers must be able to document the acceptance of purchase orders at the location in the municipality or the county that has established the enterprise zone.

In order for the enterprise zone building materials exemption to be claimed, it must be shown that qualifying building materials were purchased from a retailer located in the jurisdiction that created the enterprise zone into which the building materials will be incorporated. It is critical that a clear paperwork trail exists showing that buyers purchased the materials from qualified retailers. In general, the following two transactions must exist:

1. Sales from suppliers to retailers who are located in the jurisdiction that created the enterprise zone (exempt as sales for resale); and
2. Sales from retailers who are located in the jurisdiction that created the enterprise zone to buyers (exempt by reason of the enterprise zone building materials exemption).

Each of these transactions must exist independent of the other and the exemption applicable to each transaction must be documented. We urge taxpayers not to be cavalier in structuring these transactions. Generally, the following documentation establishes the two transactions and the available exemptions:

1. Sales from suppliers to retailers:
  - a. Purchase orders from retailers to the suppliers;
  - b. Certificates of Resale from retailers to suppliers (see the enclosed copy of 86 Ill. Adm. Code 130.1405, which describes the requirements for Certificates of Resale);
  - c. Invoices from suppliers to retailers; and
  - d. Payments to suppliers from retailers.
2. Sales from retailers to purchasers:
  - a. Purchase orders from purchasers to the retailers;
  - b. Enterprise zone building materials certifications from purchasers to retailers containing all of the information set forth at 86 Ill. Adm. Code 130.1951(a)(3);
  - c. Invoices from retailers to purchasers; and
  - d. Payments to retailers from purchasers.

There is no requirement that the materials be physically received at the retailer's location.

Under the first alternative, you have indicated that the retailer will have an identifiable physical presence in the municipality or the county that has established the enterprise zone. You have also indicated that the retailer will register with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone. Further, you have indicated that the retailer will be able to document the acceptance of purchase orders at the location in the municipality or the county that has established the enterprise zone.

Your letter stated that a clear paperwork trail would exist showing that buyers purchased the materials from qualified retailers. The letter stated that “[t]he Retailer will proceed to prepare a purchase order directed to the necessary material supplier” after the retailer receives a purchase order and an enterprise zone building materials certification from the subcontractor. Your letter also stated that the retailer “will provide the material supplier with a completed resale certificate” and that “[t]he material supplier will invoice the Retailer. The Retailer will, in turn, invoice the Construction Subcontractor. The Construction Subcontractor will issue a check to the Retailer. The Retailer will issue its check to the material supplier”.

Sales of the building materials made in compliance with the first alternative, as set forth in your letter, will qualify for the enterprise zone exemption.

Under the second alternative, you have indicated that the retailer will have an identifiable physical presence in the municipality or the county that has established the enterprise zone. You have not indicated that the retailer will register with the Department as a retailer at a location in the municipality or in the unincorporated area of the county that has established the enterprise zone, however for the purposes of this response, the Department will assume that the retailer will so register with the Department. Further, you have indicated that the retailer will be able to document the acceptance of purchase orders at the location in the municipality or the county that has established the enterprise zone.

Your letter stated that a clear paperwork trail would exist showing that buyers purchased the materials from qualified retailers. The letter stated that “[t]he separate sales from the material supplier to the Retailer and from the Retailer to the purchaser required by 86 Ill. Admin. Code 130.1951(a)(3) will exist”. Your letter also stated that completed resale certificates will be provided when appropriate and that “[t]he material supplier will invoice the Retailer. The Retailer will, in turn, invoice the JV. The JV will issue a check to the Retailer. The Retailer will issue its check to the material supplier”.

Sales of the building materials made in compliance with the second alternative, as set forth in your letter, will qualify for the enterprise zone exemption.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules, or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis  
Associate Counsel

MAJ:msk  
Enc.